

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

OPAL HARGER, *et al.*

Plaintiffs,

v.

U.S. DEPARTMENT OF LABOR,  
and THE NATIONAL INSTITUTE  
OF OCCUPATIONAL SAFETY  
AND HEALTH,

Defendants.

NO. CV-06-5071-RHW

**ORDER DENYING MOTION FOR  
PRELIMINARY INJUNCTION  
*INTER ALIA***

Before the Court are Plaintiffs' Motion for Preliminary Injunction (Ct. Rec. 110) and Motion for Joinder of Kim King for June Siwicki (Ct. Rec. 113). A telephonic hearing was held on November 20, 2007. Plaintiffs were represented by Tom Foulds; Assistant United States Attorney Rolf Tangvald appeared on behalf of Defendants. Due to technological difficulties during the hearing, the Court notes that Plaintiffs' counsel was cut off during his oral argument. However, counsel had argued for 25 minutes at the time he was cut off, and the Government rested on its brief and did not submit any oral argument. The Court had sufficient information on the record to make an informed decision in this matter, so it did not resume the hearing.

In this motion, Plaintiffs' counsel Tom Foulds is asking the Court to enjoin the Department of Labor (DOL) from distribution of funds for payment of any EEOCIPA (Energy Employees Occupational Illness Compensation Program Act of

ORDER DENYING MOTION FOR PRELIMINARY  
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1 2000 (EEOICPA or “Act”), 42 U.S.C. § 7384, *et seq.*) lump sum awards to any  
2 former DuPont Hanford workers or their survivors included in the Special  
3 Exposure Cohort (SEC), as defined in the order creating the SEC that became law  
4 on October 29, 2007.<sup>1</sup> 72 Fed. Reg. 61,167-68 (Oct. 29, 2007).

5 To obtain a preliminary injunction in federal court, Plaintiffs are required to  
6 demonstrate: “(1) a strong likelihood of success on the merits, (2) the possibility of  
7 irreparable injury to plaintiff[s] if preliminary relief is not granted, (3) a balance of  
8 hardships favoring the plaintiff[s], and (4) advancement of the public interest (in  
9 certain cases).” *Johnson v. Cal. State Bd. of Accountancy*, 72 F.3d 1427, 1430 (9th  
10 Cir. 1995) (citation and internal quotation marks omitted). These factors have been  
11 incorporated into two inquires under which the moving party may meet its burden  
12 by demonstrating either (1) a combination of probable success on the merits and  
13 the possibility of irreparable injury, or (2) that serious questions are raised and the  
14 balance of hardships tips sharply in its favor, and at least a fair chance of success  
15 on the merits. *Owner Operator Indep. Drivers Ass’n, Inc. v. Swift Transp. Co.*, 367  
16 F.3d 1108, 1111 (9th Cir. 2004). “These two formulations represent two points on  
17 a sliding scale in which the required degree of irreparable harm increases as the  
18 probability of success decreases.” *Id.* Or put another way, “the greater the  
19 hardship to the party seeking the preliminary injunction, the less probability of  
20 success must be established by the party.” *Harris v. Bd. of Supervisors, Los*

21 \_\_\_\_\_  
22 <sup>1</sup> The new SEC grants EEOICPA funds to a class of former Dupont Hanford  
23 workers without establishing the 50 percent causation probability. The problems  
24 involved in properly establishing this probability forms the heart of Plaintiffs’  
25 claims in this suit, so it appears the new class renders some of Plaintiffs’ claims  
26 moot. Plaintiffs submit three of their number, Watters (or her surviving daughter  
27 Graber), Mundy (or his surviving daughter Caputo), and Herman (or his surviving  
28 daughter Caputo), are members of the new SEC.

1 *Angeles County*, 366 F.3d 754, 759 (9th Cir. 2004).

2 Plaintiffs assert they have clearly shown a likelihood of success on the  
3 merits and a possibility of irreparable injury. Mr. Foulds states his responsibility  
4 for the creation of the SEC has been fully documented, and he argues that the  
5 “common fund doctrine” provides that he should receive attorney’s fees for his  
6 efforts out of the common fund of the awards before they are disbursed. The  
7 Government avers the Court should deny this motion and the motion for an  
8 equitable lien against each award to an SEC member on several bases: there is no  
9 merit to the motion; the Court has no jurisdiction to grant the relief requested; and  
10 Mr. Foulds will not suffer irreparable injury as a result of the denial of his motion.

11 The common fund doctrine, as explained by the Supreme Court, holds “that  
12 a litigant or a lawyer who recovers a common fund for the benefit of persons other  
13 than himself or his client is entitled to a reasonable attorney’s fee from the fund as  
14 a whole.” *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980) (citation omitted).  
15 Mr. Foulds focuses on the fact that, to receive benefits from a common fund, the  
16 fund need not be the result of a class action. However, the Supreme Court limited  
17 its holding to funds over which the awarding court has jurisdiction:

18 The doctrine rests on the perception that persons who obtain the  
19 benefit of a *lawsuit* without contributing to its cost are unjustly  
20 enriched at the successful *litigant’s* expense. *Jurisdiction over the*  
21 *fund involved in the litigation* allows a court to prevent this inequity  
22 by assessing attorney’s fees against the entire fund, thus spreading  
23 fees proportionately among those benefited [sic] *by the suit*.

24 *Id.* (emphases added) (citations omitted). In other words, fundamental to the  
25 Court’s holding is that the award of the funds must be the result of a lawsuit. *See*  
26 *id.* at 478-79. Therefore, “application of the common fund doctrine thus requires  
27 court ‘control over a fund or jurisdiction over the parties. . . .’” *United States ex*  
28 *rel. Bogart v. King Pharms.*, 493 F.3d 323, 329 (3d Cir. 2007) (quoting *Vincent v.*  
*Hughes Air West, Inc.*, 557 F.2d 759, 774 n.15 (9th Cir. 1977)).

The funds to be awarded via the newly-established SEC were awarded

1 through legislative, not judicial action. The Government correctly points out that  
2 the common fund doctrine does nothing to overcome the hurdle of sovereign  
3 immunity, which bars creditors from enforcing a lien on government property.  
4 *Dep't of the Army v. Blue Fox, Inc.*, 525 U.S. 255, 264 (1999).<sup>2</sup> The common fund  
5 doctrine is successfully invoked in cases involving fee recovery in private  
6 litigation, as opposed to litigation against the government. *See Consolidated Ed*  
7 *Co. of N.Y. v. Bodman*, 445 F.3d 438, 446-47 (D.C. Cir. 2006).

8 Here, the EEOICPA awards have been obtained through an administrative  
9 process separate from this litigation.<sup>3</sup> While Mr. Foulds' efforts undoubtedly had  
10 an effect on the outcome of that administrative process, the government's favorable  
11 response to those agency proceedings cannot form the basis of an attorney's fee  
12 award under the common fund doctrine, or even under the Equal Access to Justice  
13 Act, where sovereign immunity is expressly waived. *See id.* at 447-48 (finding that  
14 plaintiffs were not a "prevailing party" so as to waive government's sovereign  
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16 <sup>2</sup> Plaintiffs argue the Administrative Procedure Act, 5 U.S.C. § 702, acts as  
17 a waiver to the Government's sovereign immunity for the purposes of this motion,  
18 and they also cite to *Blue Fox* in support. However, the holding in *Blue Fox* does  
19 not permit finding a waiver of sovereign immunity to grant an equitable lien on  
20 government property. In fact, it states that "equitable liens by their nature  
21 constitute substitute or compensatory relief rather than specific relief[.]" 525 U.S.  
22 at 262, and as such are they not encompassed by the APA's waiver of sovereign  
23 immunity. *See id.* at 261-62 (discussing APA waiver analysis in *Bowen v.*  
24 *Massachusetts*, 487 U.S. 879 (1988)).

25 <sup>3</sup> Mr. Foulds insists the creation of the SEC was the result of an "adversarial  
26 process." Although the process may very well have been adversarial, it did not  
27 take place under the jurisdiction of this Court. Therefore, the Court does not have  
28 the power to influence the disbursement of the funds in question.

1 immunity of “common fund” claim where lawsuit played no causal role in the  
2 relief gained, which instead came from agency’s favorable response to comments  
3 submitted in agency proceedings). Therefore, the Court denies Plaintiffs’ request  
4 to enjoin the DOL from disbursing funds to members of the newly-created SEC.

5 Plaintiffs also ask this Court to join Kim King, a surviving daughter of  
6 former Hanford worker, June Siwicki, to their claims. Ms. King’s claim presents  
7 the same legal and factual questions that were prevalent in Plaintiffs’ previously  
8 granted motions for joinder. (Ct. Recs. 34, 43, 61, 83, & 92). Plaintiffs’ most  
9 recent Motion for Joinder is granted.

10 Accordingly, having considered the record in its entirety, **IT IS HEREBY**  
11 **ORDERED:**

12 1. Plaintiffs’ Motion for Preliminary Injunction (Ct. Rec. 110) is **DENIED**.

13 2. Plaintiffs’ Motion for Expedited Hearing on Motion for Preliminary  
14 Injunction (Ct. Rec. 109) is **GRANTED**.

15 3. Plaintiffs’ Motion for Joinder of Kim King for June Siwicki (Ct. Rec.  
16 113) is **GRANTED**.

17 **IT IS SO ORDERED.** The District Court Executive is directed to enter this  
18 Order and to provide copies to counsel.

19 **DATED** the 29<sup>th</sup> day of November, 2007.

20 *S/ Robert H. Whaley*

21 ROBERT H. WHALEY  
22 Chief United States District Judge

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